Supreme Court, U. S.
FILED
DEC 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976.

No. [redacted] 76-658

NORFOLK, BALTIMORE AND CAROLINA LINES, INC., and LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR; and LEE ROUSE (Deceased),
*Respondents.*

## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The amici filing this brief are The Travelers Insurance Company and Nacirema Operating Company. The brief is filed with the consent of Charles H. Gibbs, Esquire, counsel for the Petitioner, James F. Kent, Esquire, counsel for the Respondent, Rouse, and Linda L. Carroll, Esquire, U. S. Department of Labor. The consents were obtained by telephone and confirmed by letters which are reproduced as an appendix to this brief.

Travelers Insurance Company is a large insurance carrier facing many similar claims. Nacirema Operating Company is a stevedoring company and has similar claims brought against it.

Counsel for the amici are mindful of the provisions of Rule 42 of this Court that briefs in support of the Petition for a Writ of Certiorari are not favored. Amici are of the opinion, however, that important points have not been emphasized.

The Court of Appeals accepted the dichotomy that injury to a longshoreman prior to November 26, 1972, the effective date of extensive amendments to the Longshoremen's and Harbor Workers' Act (hereinafter "the Act"), 33 U. S. C. A. 901 et seq., gave rise to one cause of action and that his death after the effective date of the amendments triggered a second cause of action created in Section 9 of the Act by the November, 1972 amendment.

Amici disassociate themselves from that dichotomy for, as we will point out, it is basically fallacious.

The 1972 amendments to the Act created a new class of beneficiaries. Prior to the amendments, widows, children, etc. received compensation benefits only when the

death was related to the original injury. The 1972 amendment, as interpreted by the Court of Appeals, would create a totally new class of beneficiaries. A widow, whether dependent or not, receives compensation benefits [Section 909(b)] as do other relatives such as grandchildren, brothers or sisters, if dependent [Section 909(d)].

Thus the effect of the decision below is that the 1972 amendments, by legislative fiat, created this new class of beneficiaries and imposed liability for payment upon employers where the death was totally unrelated to the original compensable injury. It is the position of amici that this was not Congressional intent and that the construction the Court of Appeals has placed upon the Act would render that section unconstitutional as violative of the Fifth Amendment rights of employers such as Nacirema and their insurance carriers such as The Travelers, whose position is identical to that of the two Petitioners in the case now before the Court in 75-1896.

Willa Cather said it effectively: "Last night, as it must to all men, death came to the Archbishop". It is that inevitability of death which makes the 1972 amendment to Section 9 of the Act unconstitutional if the construction of the Court of Appeals be correct. If the Court of Appeals' construction of the amendment is correct, then in November, 1972, there became vested in wives and children as defined by the Act and the other relatives enumerated in the amendments the right to receive compensation benefits. The obligation to pay them became fixed. Only the date of enjoyment was uncertain. Enjoyment was to be postponed so long as the longshoreman lived but the right to receive was created by and became vested in November, 1972. It is that construction which the Court of Appeals has placed upon Section 9 which is contrary to both Congressional intent and the Fifth Amendment rights of those upon whom the obligation to pay is imposed.



At 118 Congressional Record H 10,043 [daily ed. October 14, 1972] the following appears:

> "Mr. BURTON: ° ° ° Does the gentleman from Minnesota (Mr. QUIE) concur in the judgment of the bill managers and of the subcommittee chairman (Mr. DANIELS) that any cause of action arising prior to the date of enactment of this legislation would be in no way aborted, frustrated, or reduced in any manner, shape or form?
>
> There are no existing remedies available to an injured longshoreman as of this date that would be affected or diminished for any cause of action arising prior to the effective date of this act. Any effort made through motions to dismiss actions in the Federal courts would be unavailing if this clear intention of the Congress is followed.
>
> ° ° °
>
> Mr. QUIE: The answer to the gentleman's answer is 'yes'.
>
> Mr. ECKHARDT: ° ° °
>
> I will state, in answer to the gentleman, that *of course this bill is not retroactive.*" [emphasis ours]

Thus, in the only statement in the Congressional history of which we are aware, it would appear that the Congress did not intend to make the benefits created by the 1972 amendments retroactive. If this be so, then the fact that Mr. Rouse died of natural causes after the effective date of the 1972 amendments was not intended to create in his widow the right to receive compensation for her widowhood where that provision had not been a part of the Act at the time Rouse was injured. As this Court said in *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231

U. S. 190 at 199, quoted with approval in *Greene v. United States,* 376 U. S. 149 at 160, 161:

> ". . . [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past ° ° ° [and] a retrospective operation will not be given to a statute which interferes with antecedent rights ° ° ° unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" [1]

It is not a question of increasing the benefits to a class already covered by the Act as the Court of Appeals seemed to view it when it relied upon its own prior decision in *Hampton-Roads Stevedoring Corp. v. O'Hearne,* 184 F. 2d 76 [C. A. 4, 1950]. Because every man must die, a new class of beneficiary was created in 1972.

As is the case with all workmen's compensation statutes, the Act is based upon a mutual surrendering of rights in exchange for definite benefits. This "quid pro quo" is an essential feature of the Act, *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.,* 350 U. S. 124 at 129, and was the foundation upon which constitutionality of such acts has been upheld. *New York Central R. Co. v. White,* 243 U. S. 188; *Crowell v. Benson,* 285 U. S. 22.

There is not and cannot be any *"quid"* as between the employer and this new class of beneficiaries created in November, 1972 where the employee was injured prior to 1972, was permanently and totally disabled as of November, 1972 by reason of injuries sustained prior to that date and where death results from natural causes.

The obligation imposed upon the Petitioner to make these payments to this new class of beneficiaries created

1. See also The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, by Smead, 20 Minn. L. R. 775-781 (1936).



as of November, 1972 is, if the construction placed upon it by the court below is correct, a taking of the Petitioner's property for a public use—in violation of the Fifth Amendment. The Court of Appeals has said so quite frankly when it points out that it was the intent of Congress "to enlarge the recompense provided to the survivors of a longshoreman dying after suffering a permanent and total disability". The Court of Appeals justifies its holding by suggesting that the application of amended Section 9 is not retrospective because entitlement or enjoyment of survivors' benefits would necessarily accrue in the future. That, however, begs the question and does not answer it in view of the inevitability of death. The liability of the Petitioner to an entirely new class of beneficiaries became irretrievably fixed upon the effective date of the 1972 amendments if the decision of the court below be correct. The court below ignored the inescapable fact that a substantial additional liability was imposed upon the Petitioner, "vested in the new class of beneficiaries" upon the effective date of the Act and for which the Petitioners received no "quid".

In *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541, this Court held that it would not, for the purpose of considering constitutionality, construe a statute as imposing liability for events which had occurred before enactment. Mr. Rouse, the injured longshoreman, had become permanently and totally disabled prior to the 1972 amendments and, therefore, the Court of Appeals looks to that fact which had occurred before the 1972 amendments and imposed liability upon the Petitioners when, as was inevitable, Mr. Rouse died from natural causes.

Prior to the 1972 amendment, the Petitioner had absolutely no liability to make payments to the survivors of a permanently and totally disabled longshoreman who sub-

sequently died from natural causes. If the Court of Appeals' view of the amendment is correct, then on the effective date of the amendments, Petitioner and others similarly situated had a liability imposed upon them to make payments to survivors when death occurred to the longshoreman, not death related to his injury but death from unrelated causes. Retroactivity is not favored by the courts and a statute will only be so construed where Congressional intent to make it so is clearly mandated. *Bell v. Isthmian Lines*, 363 F. Supp. 156 [M. D. Fla. 1973]. Here, the Fifth Amendment's prohibition against taking private property (the Petitioner's money) for public use, [the indemnification of survivors of permanently and totally disabled workmen] without any compensation to the parties required to pay is violative of the Fifth Amendment rights of the Petitioners. By Section 44 [33 U. S. C. A. 944], Congress did establish a separate fund and provided that payments from the fund should be available to reimburse employers or their insurers for increased compensation benefits provided for by Sections 10 and 11 of the Act [see 33 U. S. C. A. 944(j)]. It made no similar provision for the payments now required to be made to survivors under Section 9 where death is unrelated to the compensable injury. We must conclude from that plus the Congressional history that Congress did not intend to take Petitioner's money without just compensation and, therefore, that it did not intend that Section 9 of the Act would be retroactively applied to include survivors of longshoremen whose injury predated the effective date of the 1972 amendments.

The effect of the decision below is not confined to longshoremen and harbor workers. The provisions of the Act are extended by satellite statutes to all workmen in the District of Columbia, on Defense Bases, the Outer



Continental Shelf and all projects covered by the Non-appropriated Fund Instrumentalities Act.

Amici accordingly support the Petition and ask that this Honorable Court shall grant certiorari, examine the question of the taking of private property without just compensation and thereafter construe the Act as written so that the constitutional infirmity no longer exists.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
MARK D. ALSPACH,
KRUSEN EVANS AND BYRNE,
21 South 12th Street,
Philadelphia, Pa. 19107
*Counsel for Amici Curiae,*
*Travelers Insurance Company and*
*Nacirema Operating Company.*

## APPENDIX.

[Letterhead of]

KRUSEN EVANS AND BYRNE
21 South Twelfth Street
Philadelphia, Pa. 19107

December 28, 1976

Joseph F. Kent, Esquire
Neighborhood Legal Assistance Program, Inc.
119 Spring Street
Charleston, S. C. 29403

*Re: Rouse v. Norfolk, Baltimore and Carolina Lines, Inc., et al*
*United States Supreme Court No. 75-1896*

Dear Mr. Kent:

This will confirm our telephone conversation on December 20. At that time, we informed you that we had been requested to represent Travelers Insurance Company and Nacirema Operating Company in a case pending in Philadelphia which is on all fours with the *Rouse* case. We requested that you consent to our filing a Brief Amicus Curiae on behalf of our clients in support of the Petition for Writ of Certiorari which had been filed in *Rouse*.

This letter is simply to confirm your statement by telephone that you did consent to the filing of the Brief Amicus Curiae. Your courtesy in so doing is much appreciated and I will, of course, send you a copy as soon as it is received from the printer.

Again, thank you for your courtesy.

Very truly yours,

T. E. Byrne, Jr.

/mm

[Letterhead of]

KRUSEN EVANS AND BYRNE
21 South Twelfth Street
Philadelphia, Pa. 19107

December 28, 1976

Charles H. Gibbs, Esquire
2 Prioleau Street
P. O. Box 340
Charleston, S. C. 29402

*Re: Rouse v. Norfolk, Baltimore and Carolina Lines, Inc., et al*
*United States Supreme Court No. 75-1896*

Dear Mr. Gibbs:

This will confirm our several telephone discussions in connection with the Petition for a Writ of Certiorari which you have filed in the Supreme Court.

I confirm to you that we have been asked to act for Travelers Insurance Company and Nacirema Operating Company in a case on all fours with this one. We requested your consent that we, on behalf of our clients, might file a Brief Amicus Curiae in support of your Petition. In our conversation, you signified your consent and I simply write to confirm it.

Your courtesy is very much appreciated.

Yours very truly,

T. E. Byrne, Jr.

/mm



[Letterhead of]

KRUSEN EVANS AND BYRNE
21 South Twelfth Street
Philadelphia, Pa. 19107

December 28, 1976

Linda L. Carroll, Esquire
U. S. Department of Labor
200 Constitution Avenue N.W.
Washington, D. C. 20210

*Re: Rouse v. Norfolk, Baltimore and Carolina Lines, Inc., et al*
*United States Supreme Court No. 75-1896*

Dear Ms. Carroll:

This will confirm several telephone conversations between us in the above-captioned matter. We informed you that we had been requested to represent Travelers Insurance Company and Nacirema Operating Company in a case where identical legal questions to those in the *Rouse* case are involved. We requested your consent to our filing a Brief Amicus Curiae on behalf of our clients in support of the Petition for Writ of Certiorari. We confirm that you gave us telephone consent in your capacity as attorney for the Department of Labor.

We likewise confirm that you notified us that you could not speak for the Office of the Solicitor General. The Office of the Solicitor General did not appear in the Court of Appeals and I have no way of identifying who in that office might be involved now that the case is in the

Supreme Court. I have not contacted that office to request consent.

Thank you for your courtesy and cooperation.

Very truly yours,

T. E. Byrne, Jr.

/mm